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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/631,149	07/31/2003	Phillip B. Blankenship	731266.02646	2224
72766 7590 06/24/2008 Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. 100 North Broadway Chase Tower, Suite 2900 Oklahoma City, OK 73102				
EXAMINER MILLER, DANIEL H				
ART UNIT 1794		PAPER NUMBER		
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/631,149

**Applicant(s)**

BLANKENSHIP ET AL.

**Examiner**

DANIEL MILLER

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 27 May 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/ICE)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/27/2008 has been entered.

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claims 1-10 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Applicant provides an example that has 99.8% by weight of the aggregate having a sieve size of less than 4.75 mm in the

specification. However it is not clear where applicant has support for the range of below 99.8% to 50% of the aggregate being a sieve size of 4.75 mm. Nowhere in the specification does applicant describe a range of 99.8 % or below 99.8% to 50% of the aggregate having a sieve size of less than 4.75 mm. Therefore, it is not clear that applicant was in possession of or appreciated the significance of the range at the time of filing.

3. Further regarding claims 9 and 10, it is not clear where applicant has support for the recites ranges as newly claimed. No support is found in the specification for these ranges. Especially in conjunction with the range recited in claim 1, from which both claim 9 and 10 ultimately depend. Correction required.

### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-6, 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Maier (UK 1448158) in view of Cramwinckel (U.S. 3,822,556), further in view of Construction and Building Materials 16 (2002) 313-319; Jian-Shiuh Chen; Evaluation of internal resistance in hot mix asphalt concrete (available on-line 13 Aug. 2002).

2. Regarding claim 1, Maier teaches a paved surface having 12% natural sand and bitumen binder (page 1 line 70-75 and page 4 line 5-10).
3. The binder contains asphalt and polyamine (see claim 1). Applicant discloses the uses a polyamide (polymer) additive (remarks 6/6/07), which are similar amine based polymer. Polyamine and Polyamide are generic classes of polymers and neither Maier, nor applicant, teach which specific polymer is used. Further, Regarding claim 2, the binder is considered to be a binder traditionally used to modify an asphalt binder for use in paving surfaces (as claimed).
4. Regarding claim 6, the layer is inherently a substantially impermeable polymer.
5. Maier is silent as to the binder being petroleum based, the selection of binder based on climate, or the stability and fatigue levels of the pavement.
6. Cramwinckel teaches asphalt with a bitumen binder that is impermeable to water with a thickness of 2.5 cm (column 1 line 30-35, column 2 line 45-50).
7. Cramwinckel further teaches that the bitumen binder can be prepared from any suitable material (column 2 line 63-68) and can be adapted to the climate conditions (column 3 line 1-4). Further, regarding claim 6, Cramwinckel further teaches the asphalt is impermeable to water (column 1 line 30-35).
8. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Maier to incorporate a binder that would be appropriate for applications under particular climates as taught by Cramwinckel. Further, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the composition of the aggregate, including choosing from coal and/or petroleum based

binders, in order to optimize the stability fatigue level, and resistance to reflective cracking of the pavement for the intended application and to maximize the suitability of the material for particular climates. Since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

9. However, both Maier and Cramwinckel are silent as to the percentage of aggregate less than about 4.75 mm.

10. Chen teaches that it is desirable to select aggregates based on properties of the aggregate to produce high quality paving mixtures (abstract). Specifically, selecting a range of fine aggregate passing through a 4.75 mm sieve is desirable (abstract). Chen teaches preparing several comparative aggregate and binder mixes with a 10%, 20%, 30%, 40%, and 50% aggregate passing through a 4.75 mm sieve respectively (see figures and section 2.1). The 50% mixture of Chen has increased tensile strength over the other samples and low void formation compared to other samples (see figures 2 and 3).

11. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Maier and Cramwinckel to include 50% aggregate having a sieve size less than about 4.75 mm in order to produce a high quality product with increased tensile strength and low void formation.

12. Regarding claims 9 and 10, it would further have been obvious to one of ordinary skill in the art at the time of the invention to increase the percentage of aggregate having a sieve size less than about 4.75 mm to a range of about 66% to about 99.8%,

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as claimed, because one of ordinary skill would expect, based on the data of figure 2 (Chen), that an increase in the percentage would lead to higher tensile strengths and therefore stronger roads. Finally, further decreasing between 25% to about 53.8% (which overlaps Chen's taught ranges) of the aggregate size to 1.18 mm (a standard sieve size known in the art), as in applicant's claim 10, would be expected by one of ordinary skill to produce an even higher quality mixture with high tensile strength and lower void formations based on the teachings of Chen and therefore would also be obvious.

13. Claims 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Maier in view of Cramwinckel (U.S. 3,822,556) further in view of Construction and Building Materials 16 (2002) 313-319; Jian-Shiuh Chen; Evaluation of internal resistance in hot mix asphalt concrete (available on-line 13 Aug. 2002) as applied to claim 1, and still further in view of Malloy et al (U.S. 6,669,773).

14. Maier teaches a paved surface having 12% natural sand and bitumen binder (page 1 line 70-75 and page 4 line 5-10).

15. However, Maier in view of Cramwinckel further in view of Chen, discussed above, are silent as to the aggregate asphalt comprising less than 10% or 5% natural sand.

16. Malloy teaches a synthetic lightweight aggregate (SLA) used as a substitute for sand in paving construction (column 1 line 10-20; column 9 line 10-25). The aggregate

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has the advantage of being a cheaper recycled material and favored in applications where weight is a concern (column 1 line 26-33 and 48-54).

17. Therefore, since it was known at the time of the invention to use a less sand in an asphalt pavement application it would have been obvious to one of ordinary skill in the art to replace all or some of the sand because it can be cheaper and provide a lower density aggregate.

18. It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the composition of the aggregate, including adjusting the percentage of sand in order to optimize the stability and fatigue, and level and resistance to reflective cracking of the pavement for the intended application and to maximize the suitability of the material for particular climates. Since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

### ***Response to Arguments***

19. Applicant's arguments with respect to claims 1-10 have been considered but are moot in view of the new ground(s) of rejection.



***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DANIEL MILLER whose telephone number is (571)272-1534. The examiner can normally be reached on M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Daniel Miller

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794